CITATION:	*JKC Australia LNG Pty Ltd v Inpex Operations Australia Pty Ltd & Ors* [2018] NTCA 6
PARTIES:	JKC AUSTRALIA LNG PTY LTD (ABN 14 154 383 409) v INPEX OPERATIONS AUSTRALIA PTY LTD (ABN 48 150 217 262) and ICHTHYS LNG PTY LTD (ACN 150 217 299) and HUGH DAVIS
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	AP 9 of 2017 (21706782)
DELIVERED:	26 June 2018
HEARING DATE:	28 February 2018
JUDGMENT OF:	Grant CJ, Southwood J and Mildren AJ

CATCHWORDS:

ADMINISTRATIVE LAW – JUDICIAL REVIEW – CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS)

Whether adjudicator appointed under the *Construction Contracts (Security of Payments) Act* (NT) failed to provide procedural fairness – relevant issue identified by the adjudicator and the parties were given opportunity to address it – no failure to provide procedural fairness – appeal allowed – whether adjudicator a bona fide attempt to comply with the essential requirements of the Act – no notice of dispute given within the prescribed time – respondent liable to pay amount of the claim – no obligation in those circumstances to determine whether works identified in the payment claim undertaken and their value – notice of contention dismissed.

Construction Contracts (Security of Payments) Act (NT) ss 3, 4, 8, 10, 15, 20, 26, 27, 28, 29, 30, 33, 34, 38, 43, 45, 47, 48

AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd (2009) 25 NTLR 14, *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd (No 2)* [2015] VSC 500, *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 42, *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15, *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205, *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130, *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5, *M & P Builders Pty Ltd v Norblast Industrial Solutions Pty Ltd* (2014) 34 NTLR 162, *Musico v Davenport* [2003] NSWSC 977, *Pacific General Securities Ltd & Anor v Soliman and Sons & Ors* (2006) 196 FLR 388, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4, *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151, *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty* Ltd [2014] WASC 40, referred to.

REPRESENTATION:

Counsel:

Appellant:	N Hutley SC with BA Millar
First Respondent:	A Wyvill SC with JW Roper
Second Respondent	A Wyvill SC with JW Roper
Third Respondent	No appearance

Solicitors:

Appellant:	De Silva Hebron as town agent for DLA Piper Australia
First Respondent	Paul Maher Solicitors as town agent for Allens
Second Respondent:	Paul Maher Solicitors as town agent for Allens
Third Respondent:	Not applicable

Judgment category classification:	B
Number of pages:	34

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

JKC Australia LNG Pty Ltd v Inpex Operations Australia Pty Ltd & Ors [2018] NTCA 6
No AP 9 of 2017 (21706782)

BETWEEN:

JKC AUSTRALIA LNG PTY LTD (ABN 14 154 383 409)
Appellant

AND:

INPEX OPERATIONS AUSTRALIA PTY LTD (ABN 48 150 217 262)
First Respondent

AND:

ICHTHYS LNG PTY LTD (ACN 150 217 299)
Second Respondent

AND:

HUGH DAVIS
Third Respondent

CORAM: GRANT CJ, SOUTHWOOD J AND MILDREN AJ

REASONS FOR JUDGMENT
(Delivered 26 June 2018)

THE COURT:

[1] The first question in this appeal is whether the Court below erred in finding that an adjudicator appointed under the *Construction Contracts*

(Security of Payments) Act (NT) (**the Act**) to determine the merits of a contested payment claim failed to provide procedural fairness to the first and second respondents (**INPEX**). That failure was found in circumstances where the adjudicator sought submissions from the parties about a preliminary view he had taken to the construction to be given to certain terms of the construction contract and, having received those submissions, determined the matter adversely to INPEX without giving the parties a further opportunity to be heard about the consequences of that conclusion. The determination was made notwithstanding all the parties had submitted that the adjudicator's preliminary view was incorrect.

[2] The second question in this appeal is the correctness of INPEX's contention by notice that even if the Court below was in error about the failure to provide procedural fairness to INPEX, the order quashing the adjudicator's determination should stand because the obligation to determine the payment dispute under s 33(1)(b) of the Act could not be validly discharged:

(a) unless the adjudicator considered whether the underlying work had been performed and correctly valued under the construction contract; and

(b) without determining whether the payment claim was a valid claim within the meaning of the Act.

Factual background

[3] As the court below stated, INPEX are joint venturers in the Ichthys Gas Field Development Project (**the Project**). The Project consists of a central processing facility off the Western Australian coast connected by a pipeline to the onshore processing facilities at Bladin Point, which will include two LNG trains, LPG and condensate plants, product storage tanks, administration facilities and a materials offloading facility and jetty.

[4] By a construction contract dated 9 February 2012 (**the EPC Contract**), the appellant (**JKC**) was engaged by INPEX to provide engineering procurement, supply, construction and commissioning of onshore facilities for the Project for a contract price in the order of USD 13 billion. The works to be performed by JKC under the EPC Contract included what are called "Re-measurable Works". This category of works included work involving module fabrication packages which were subcontracted to four subcontractors.

[5] On 3 November 2016, JKC issued two invoices to INPEX in respect of part of the Re-measurable Works, one for USD 205,825,452.00 and a separate invoice for GST on that amount. On 24 November 2016, INPEX issued a letter disputing USD 133,501,780.00 of the first invoice and USD 17,510,093.00 of the second invoice.

[6] On 3 January 2017, JKC served on INPEX an application under s 28 of the Act for adjudication of the resulting dispute (**the Application**). The Application did not seek a determination of the entire disputed amount. It sought a determination that an amount of USD 83,933,837.00 was owing by INPEX to JKC on the ground that, although it claimed an entitlement to the whole amount, the balance of the amounts claimed were not readily amenable to adjudication under the Act.

[7] In response, INPEX accepted that the EPC Contract was the relevant construction contract, disputed the jurisdiction of the third respondent (**the Adjudicator**) on a number of grounds not relevant to this appeal, and disputed in detail the merits of JKC's entitlement to the USD 83,933,837.00 (**the disputed sum**).

[8] In due course the Adjudicator was appointed under the Act. As the Application consisted of 34 volumes of material, on 12 January 2017 the Adjudicator applied for, and the Construction Contracts Registrar granted, an extension of time within which to make a determination.

[9] By email to the parties on 25 January 2017, the Adjudicator sought further submissions from the parties as follows:

> Gentlemen
>
> I have had the opportunity to review the parties' submission and the EPC Contract. A possible issue arises with respect to uncertainty in the payment terms of the EPC Contract. The question is: whether the provisions implied into deficient

construction contracts by section 20 of the NT Act should or should not be imported into the EPC Contract?

I invite both parties to address this question, in no more than two pages, by close of business Friday, 27 January 2017. Submissions from both parties must be strictly confined to the question raised. Please provide electronic copies of relevant authorities.

[10] At 9:53 am on 27 January 2017, the solicitors for JKC (DLA Piper) responded: "We would be grateful if you could clarify which part of the payment terms of the EPC Contract give rise to a possible issue with uncertainty."

[11] At 11:12 am on 27 January 2017, the Adjudicator sent an email to the solicitors for both parties stating:

> Article 34.2(a) of the Contract provides that, if Inpex dispute a payment claim, it must notify JKC within 21 days of receipt specifying in writing the items to which Inpex objects and the reasons for its objections. If such notice is given, JKC is required to either:
>
> - re-submit a single ***revised*** payment claim taking into account Inpex's objections; or
> - promptly re-submit to Inpex two new separate payment claims, one for the undisputed part of the original invoice and the other for the ***revised*** part of the original invoice.
>
> Relevantly, both options require JKC to produce a ***revised*** payment claim.
>
> Article 34.2(b) of the Contract provides that if the ***revised*** payment claim is disputed wholly or in part, ***the procedure in Article 34.2(a) must be repeated*** until the parties have reached agreement as to the part of the invoice that is in dispute.
>
> I have formed a <u>preliminary</u> view, that due to the circular and repetitious nature of Articles 34.2(a) and 34.2(b), Inpex could indefinitely delay payment. The question then arises: whether the provisions implied into deficient construction contracts by section 20 of the Act should or should not be imported into the EPC Contract to cure the uncertainty? (Emphasis as in the original.)

[12] All of the solicitors for the parties responded that there was no basis for importing the implied provisions under s 20 of the Act into the EPC Contract. It is unnecessary to consider the correctness of those submissions.

[13] The Adjudicator delivered his determination on 1 February 2017. Contrary to the submissions of the parties, he determined that s 20 of the Act operated to imply into the EPC Contract the terms set out in Division 5 of the Schedule, specifically cl 6(2), which states:

> The party [who wishes to dispute a payment claim] must:
> (a) within 14 days after receiving the payment claim:
> (i) give the claimant a notice of dispute; and
> (ii) if the party disputes part of the claim – pay the amount of the claim that is not disputed; or
> (b) within 28 days after receiving the payment claim, pay the whole amount of the claim.

[14] The Adjudicator concluded that INPEX issued the Notice of Dispute 21 days after the payment claim was lodged. While this was in accordance with the express terms of the EPC Contract, the Adjudicator found that this was not within the 14 days required by cl 6(2)(b) of the Schedule to the Act. As the Adjudicator found that s 20 of the Act operated to imply cl 6(2) of the Schedule into the EPC Contract, INPEX was obliged to pay the payment claim in full on 1 December 2016. That is, 28 days from 3 November 2016 being the date when the 14 day time limit for giving a notice of dispute expired.

Accordingly, the Arbitrator determined that INPEX was liable to pay JKC USD 83,933,837.00, and went on to make provision for the payment of interest and fixed a time for payment (**the Determination**).

[15] On 28 April 2017 the Determination was quashed by the court below.

The decision at first instance

[16] In the Court below, INPEX sought relief in the nature of certiorari to quash the Determination or, alternatively, a declaration that the Determination was void and of no force and effect.

[17] Although all the parties were agreed that the Adjudicator's finding that the implied terms in Division 5 of the Schedule to the Act were imported into the EPC Contract was plainly wrong, the court below observed that by itself did not mean that the decision was amenable to judicial review. Her Honour noted that an error of law construing provisions of the Act which vest an adjudicator with jurisdiction to make a determination will render a determination a nullity reviewable by a court[1], but non-jurisdictional errors of law or fact made by an adjudicator in the process of making a bona fide attempt to carry out the functions conferred by the Act are not amenable to review.

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1 Citing *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14.

[18] Her Honour held, citing *Brodyn Pty Ltd t/as Time Cost and Quality*[2] and a number of decisions of the Supreme Court to the same effect,[3] that if an adjudicator has not made a bona fide attempt to comply with the essential requirements of the Act, or if there has been a substantial denial of procedural fairness, an adjudication will be reviewable.

[19] There was no challenge to this part of the judgment below by any of the parties.

[20] The principal argument which was mounted by INPEX in the court below was that there was a substantial failure by the Adjudicator to accord INPEX natural justice. INPEX contended that the Adjudicator did not warn the parties that he was considering making a determination on the basis that both parties had misconstrued the EPC Contract and the Act and that he intended to proceed on the basis that cl 6 was implied into the contract, that INPEX had not complied with cl 6, and as a consequence INPEX was obliged to pay the full amount regardless of the merits of its claim.

[21] It was put that this deprived INPEX of the opportunity to put material before the Adjudicator as to why that result should not follow even if

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2 (2004) 61 NSWLR 42.

3 *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at 138 [43]; *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15 at 25 [49]; *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 1 [29]; *Hall Contracting Pty Ltd v MacMahon Contractors Pty Ltd* (2014) 34 NTLR 17 at 31 [34]. See also *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 which was delivered 8 months after the decision at first instance in this matter.

the implied terms were imported into the EPC Contract. For example, it was suggested that INPEX could have submitted that the payment claim did not comply with the requirements of the EPC Contract by failing to supply proper particulars, and so did not attract the operation of cl 6; or that JCK was precluded by estoppel or waiver from relying on any failure of INPEX to comply with the 14 day requirement for disputing liability in cl 6; or that the Adjudicator had an obligation under the Act to determine if any money was owing, which, at a minimum, required him to be satisfied that the work had been done and valued in accordance with the terms of the EPC Contract.

[22] The court below accepted INPEX's submissions. Her Honour held that: (1) procedural fairness required the Adjudicator to notify the parties of "proposed conclusions that were not put forward by the parties and could not be easily anticipated";[4] and (2) a failure to provide such procedural fairness which deprived a party of the possibility of a successful outcome[5] will enable the Court to set aside the adjudication. As the Adjudicator had not given INPEX reasonable notice of the basis upon which he intended to make his determination and a fair opportunity to address that proposed basis, and make submissions as to why he should not decide that way, her Honour found

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4 Citing *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty* Ltd [2014] WASC 40 at [10]

5 Citing *Stead v State Government Insurance Commission* (1986) 161 CLR 141; *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastrcuture Pty Ltd* [2014] WASC 40 at [12].

there was jurisdictional error and made an order in the nature of certiorari quashing the Determination.

The ground of appeal

[23] The sole ground of appeal to this Court is that the court below erred in concluding that, in performing the function under s 33(1) of the Act, the Adjudicator failed to afford INPEX natural justice amounting to jurisdictional error which justified the making of an order in the nature of certiorari quashing the Determination.

The statutory framework

[24] The Act is one of a number of closely equivalent Acts applying in the Northern Territory, New South Wales, Victoria, Queensland, the Australian Capital Territory, Tasmania, South Australia and Western Australia. The objects of the Act are set out in s 3, which states:

> (1) The object of this Act is to promote security of payments under construction contracts.
>
> (2) The object of this Act is to be achieved by:
>
> (a) facilitating timely payments between the parties to construction contracts; and
>
> (b) providing for the rapid resolution of payment disputes arising under construction contracts; and
>
> (c) providing mechanisms for the rapid recovery of payments under construction contracts.

[25] Section 26 of the Act provides that "the object of an adjudication of a payment dispute [under a construction contract] is to determine the dispute fairly and as rapidly, informally and inexpensively as

possible". Section 27 of the Act provides for a payment dispute which has arisen under a construction contract to be adjudicated.[6]

[26] A "payment dispute" arises under s 8 of the Act if a payment claim has been made under the contract and the claim has been rejected or wholly or partly disputed, or where the amount claimed is due and has not been paid in full, or in certain other circumstances not presently relevant. Section 4 of the Act defines a "payment claim" to mean a claim made under a construction contract for an amount in relation to the performance (or non-performance) of obligations under the contract. As is apparent from the terms of that definition, and from s 27 of the Act, either party to a construction contract may apply to have a payment dispute adjudicated.

[27] Section 28 of the Act provides that an application for an adjudication must be made within 90 days after the dispute arises; that the applicant must prepare a written application, serve it on the other party and on a registered adjudicator or a prescribed appointer; and that the application must be prepared in accordance with the Regulations and contain or have attached specified information. Section 29 of the Act provides that the other party to the construction contract must respond to the application within 10 working days after service, and serve that response on the applicant and the appointed adjudicator or prescribed

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6 A "construction contract" is defined by s 5 of the Act to include a contract to carry out construction work, including on-site services and professional services related to the construction work.

appointer as the case may be; and that certain prescribed documents must accompany the response.

[28] Section 30 of the Act provides that the prescribed appointer has five days to appoint a registered adjudicator. Section 33(1)(b) of the Act provides that the appointed adjudicator must, within the prescribed time, determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment and, if so, determine the amount to be paid and any interest payable within the prescribed time. Section 33(3) of the Act provides relevantly that the "prescribed time" is 10 working days after service of the response unless the time has been extended under s 34(3)(a) of the Act. The Regulations prescribe the qualifications for appointors and adjudicators. Suffice it to say that an adjudicator need not have legal qualifications.

[29] Section 34 of the Act provides for the adjudication procedure. An adjudicator must act informally, and, if possible, make the determination on the basis of the application and the response and their respective attachments. An adjudicator is not bound by the rules of evidence and may inform himself or herself in any way the adjudicator sees fit. To the extent that the Act or Regulations do not prescribe the practice and procedure in relation to adjudications, an appointed adjudicator may determine his or her own procedure.

[30] Section 38 of the Act provides that an adjudicator is required to give written reasons for the decision. Section 43 of the Act provides that the determination of a payment dispute is final and cannot be subsequently amended, cancelled or further adjudicated, subject to a "slip" provision for correcting minor errors. Section 45 of the Act provides that a determination may be enforced as a judgment for debt in a court of competent jurisdiction. Importantly, s 47 of the Act makes it clear that a determination does not prevent the parties from litigating the dispute in a court or before an arbitrator (either simultaneously or subsequently) and, to the extent that the determination has resulted in an overpayment, empowers the making of an order for restitution. Except in very limited circumstances, there is no right of appeal to a court.

[31] Section 10 of the Act provides that an agreement or arrangement (whether a construction contract or not and whether in writing or not) that purports to exclude, modify or restrict the operation of the Act has no effect, but does not prejudice or affect the operation of other provisions of the agreement or arrangement. Section 10(3) of the Act provides that any purported waiver (whether in a construction contract or not and whether in writing or not) of an entitlement under the Act has no effect.

[32] Part 2 of the Act (ss 12 to 25) provides for prohibited and implied provisions of construction contracts. Division 1 provides for

prohibited provisions, and s 15 of the Act provides that a prohibited provision has no effect. Division 2 provides for provisions to be implied where a contract does not have a written provision for certain matters. As described above, it was s 20 of the Act which the Adjudicator found operated to imply the provisions in Division 5 of the Schedule (cl 6) in relation to when and how a party must respond to a payment claim and by when payment must be made.

Application of the legal principle in the statutory context

[33] In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*[7], the High Court said:

> It has long been established that the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires. It is also clear that the particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case. [8]

[34] In *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[9], in speaking of the scheme in New South Wales, the plurality reasons observed that the legislation "creates an entitlement that is 'determined informally, summarily and quickly, and then summarily enforced without prejudice to the common law rights of both parties which can

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7 (2006) 228 CLR 152.

8 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 160-161, [26].

9 [2018] HCA 4.

be determined in the normal manner'."[10] The same is true of the scheme under the Act.

[35] In *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation*[11] Martin CJ (with whom Newnes JA concurred), observed of the Western Australian Act, on which the Act is closely modelled, that s 30 of that Act (which is in the same terms as s 26 of the Act) supported the following characterisation of the process:

> The rapid adjudication process is a trade-off between speed and efficiency on the one hand, and contractual and legal precision on the other. Its primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes.[12]

[36] His Honour's characterisation reflects what was said in the second reading speech for the Northern Territory Act, in which the responsible Minister said:

> The primary objective of the process is to keep money flowing down the contracting chain by forcing timely payment and side-lining protracted or complex disputes.
>
> The process is kept simple and will therefore be cheap and accessible, even for small claims. If a party is not satisfied with the adjudication process, it retains its full rights to go to a court, or use any other dispute resolution mechanism available under the contract. Pending any such action, the determination of the adjudicator stands, unless an application is made to the Local Court for a review of the determination and the Court exercises its

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10 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 at [44], citing *Falgat Construction Pty Ltd v Equity Australia Corp Pty Ltd* (2005) 62 NSWLR 385 at 389 [22].

11 [2016] WASCA 130.

12 *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* [2016] WASCA 130 at 426 [98].

> discretion to order a stay of the implementation of the determination pending the outcome of the review.
>
> The aim is to ensure that court processes are not used to destroy the efficacy of the process for speedy adjudication outside the court system.

[37] As the New South Wales Court of Appeal observed in *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd*[13], the broad scheme of the Act created a coherent, expeditious and self-contained scheme for resolving disputes in respect of payment claims. Shortly put, it creates a "pay now, argue later" system for the prompt resolution of disputes. One of its objects is to stamp out the practice of developers and contractors delaying payment to subcontractors. It enables a subcontractor to recover progress payments on an interim basis in circumstances where there is a protracted disputed. It confers statutory rights on a party to a construction contract to receive an interim or progress payment and enables that right to be determined informally, summarily and quickly, and then summarily enforced without prejudice to the parties' rights at common law. It also operates in some circumstances to alter the risk of insolvency if the successful contractor cannot repay in the event of a successful action by the other party.

[38] The legislative scheme operates in a "rough and ready" way by imposing a mandatory regime regardless of the terms of the contract;

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13 [2017] NSWCA 151 at [102]-[107], [130].

extremely abbreviated time frames for the exchange of payment claims and adjudication applications; and a very limited time frame within which adjudicators are required to make decisions on what can often be extremely complex claims involving very substantial volumes of documents. The tight time limits the Act imposes on an adjudicator, the possibility that the adjudicator may have no legal qualifications, and the interim nature of an adjudication inform the content of the requirements of procedural fairness in any adjudication.

[39] For these reasons, adjudications are not intended to be scrutinised in the same way as considered final determinations[14]; and, as the New South Wales Court of Appeal has observed, where "the issues … were on the table before the adjudicator, there can be no denial of procedural fairness"[15]. It was to this latter point that Southwood J was speaking in *M & P Builders v Norblast Industrial*[16], when his Honour said:

> The question in this case is whether there has been a substantial denial of natural justice. In this regard, the plaintiff placed considerable reliance on cases such as the *Zürich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd* [[2014] WASC 40] and *Musico v Davenport* [[2003] NSWSC 977]. However, the gravamen of those cases was that the parties did not have proper notice of the basis of the decision of the adjudicator or could not have reasonably anticipated that the

14 See *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151 at [105].

15 *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151 at [144].

16 (2014) 34 NTLR 162.

adjudicator would make his decision on such a basis and were thereby deprived of an opportunity to be heard.[17]

[40] That analysis is borne out by a consideration of the cases to which his Honour made reference. In *Zürich Bay Holdings*, the Court said that while it was incumbent on a decision-maker to notify the parties of proposed conclusions that were not put forward by the parties and could not be easily anticipated, generally speaking the parties must anticipate possible findings and make submissions on potential findings.[18] Similarly, in *Musico v Davenport* the principle expressed was that in order to comply with the requirements of procedural fairness the parties should have a reasonable opportunity of addressing matters "that neither party has notified to the other or contended for, and that the adjudicator has not notified to the parties".[19]

[41] The test is an objective one, and resolves to whether the party asserting the breach of procedural fairness received express notice, or should reasonably have anticipated, that either the adjudicator or the other party would rely upon the issue or principle concerned (in this case the implied condition contained in Division 5 of the Schedule to the Act).

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17 *M & P Builders Pty Ltd v Norblast Industrial Solutions Pty Ltd* (2014) 34 NTLR 162 at [41].

18 *Zürich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd* [2014] WASC 40 at [10].

19 *Musico v Davenport* [2003] NSWSC 977 at [108].

The submissions of the parties

[42] Counsel for JKC submitted that once the question whether cl 6 should be implied into the EPC Contract was raised by the Adjudicator, there was always potential for the Adjudicator to apply the terms of cl 6 to the facts in making his determination. The obvious consequence of implying cl 6 into the EPC Contract was that INPEX would be found liable to pay the whole amount claimed by JKC because INPEX had not provided a notice of dispute within 14 days as required by cl 6. The words of cl 6(2) unambiguously have that effect. As extracted at [13] above, cl 6(2) provides that the party receiving a payment claim under the contract must within 14 days after receiving the claim give the claimant a notice of dispute, failing which the party receiving the claim must pay the whole amount within 28 days after receipt.

[43] Counsel for JKC submitted that the court below was in error in the finding at [33] of the reasons for judgment because her Honour accepted that the Adjudicator did not specify that the term which might be implied into the contract was cl 6(2), or spell out what he thought the consequences of that would be. It is true that cl 6(2) was not specifically mentioned, but the Adjudicator referred expressly to s 20 of the Act, which provides:

> The provisions in the Schedule, Division 5 about the following matters are implied in a construction contract that does not have a written provision about the matter;

(a) when and how a party must respond to a payment claim made by another party;

(b) when a payment must be made.

[44] If the conditions implied by s 20 of the Act were imported into the EPC Contract, that clearly and exclusively imported cl 6 as an implied term, including, of course, cl 6(2). To that extent, the court below was in error. While it is true that the Adjudicator did not spell out what he thought the consequences of that would be, they were plain and obvious from a reading of cl 6(2).

[45] Counsel for JKC also submitted that the finding at [34] of the reasons at first instance was made in error. In that paragraph, her Honour accepted that the Adjudicator advised that "[a] possible issue arises with respect to uncertainty in the payment terms of the EPC Contract", and when later asked to clarify which part of the payment terms gave rise to that possible uncertainty, the Adjudicator referred to cll 34.2(a) and (b) of the EPC Contract. Her Honour said those clauses referred to how payment disputes are to be dealt with, and that payment terms are dealt with in cll 34.2(c) and (d). The court below went on to hold that there was never any suggestion by the Adjudicator that there was uncertainty in relation to cl 34.2 providing that INPEX must notify any objections to a payment claim within 21 days.

[46] It was put on behalf of JKC that this was to misstate the perceived uncertainty, not which part of cl 6 was in or out. The argument

followed that s 20 of the Act applied if either placitum (a) or (b) was engaged, so that if there was uncertainty when a payment must be made cl 6 was implied, with the unambiguous consequence that the 21 day period for responding to a payment claim provided under the EPC Contract was reduced to 14 days. In support of that contention, counsel for JKC relied upon the judgment of Mildren J in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd*[20], in which it was held that s 20 of the Act applied if either or both of placita (a) and (b) are not provided for in the written contract.

[47] Counsel for INPEX submitted that s 20 of the Act could not be applied so as to override a specific provision of the EPC Contract. On that contention, because the EPC Contract provided for a 21 day period for responding to a payment claim, cl 6 could not be implied to alter that period. As a matter of construction, we cannot accept this argument. The provisions of Division 5 of the Schedule either applied or they did not. As determined in *Independent Fire Sprinklers*, s 20 applies to import the whole of Division 5 if the construction contract did not have a written provision about the matter in either placitum (a) or (b), or both.

[48] Counsel for JKC next submitted that the court below erred in determining that even if INPEX had realised that cl 6 was going to be

20 (2008) 24 NTLR 15 at 25 [55]-[56].

implied in its entirety, the terms of the Adjudicator's direction to make submissions specifically precluded INPEX from making submissions about what the consequences might be if cl 6 were to be implied. The Adjudicator had said in his initial e-mail that "submissions were to be strictly confined to the question raised". Her Honour held (at [40]) that s 34(2) of the Act entitled the Adjudicator to request the parties to make further submissions, but there is nothing in s 34 which entitled the Adjudicator to prevent a party from addressing the consequences of an adverse finding. However, even if INPEX wrongly considered that it was precluded from making further submissions, it was open to it to have indicated that, at the very least, it wished to make further submissions if the Adjudicator found that cl 6 was implied into the EPC Contract.[21]

Conclusion on the appeal

[49] The question remains whether, in light of the principles discussed above, the ultimate conclusion at first instance that the Adjudicator failed to provide procedural fairness to INPEX is in error. In a case like the present, the answer to that question is that once the Adjudicator sought submissions on whether cl 6 was to be implied into the EPC Contract the possibility of a finding that no notice of dispute was given within 14 days was clearly flagged.

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21 See *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd (No 2)* [2015] VSC 500 at [165]

[50] The consequence of a finding in those terms would inevitably be that INPEX would be obliged to pay the whole sum in dispute to JKC unless there was some compelling reason why that should not be so. Counsel for INPEX in this appeal attempted to establish that, if given the opportunity, there were reasons that could have been put and that INPEX lost a fair opportunity of putting them to the Adjudicator. We make no comment on whether any of those suggested reasons have substance. However, in the absence of any such submission to the Adjudicator, and given his preliminary indication, the Determination could not, or should not, have come as any surprise to INPEX. For those same reasons, it was not incumbent on the Adjudicator to go back to the parties for further submissions in the event he determined s 20 of the Act operated to import the cl 6 provisions into the EPC Contract.

[51] Moreover, there is no evidence that in the subjective understanding of either it or its advisors INPEX was in fact taken by surprise. Counsel for INPEX in this appeal sought to suggest that there was nothing obvious about what the Adjudicator intended to do, and the relevant possibilities and permutations in the event cl 6 was implied into the EPC Contract were "endless". That submission is not borne out by the contemporaneous material. Both parties to the adjudication were represented by solicitors who were specialists in this field. Both parties made submissions which suggested a clear understanding of the

matter identified by the Adjudicator, and the consequences of the statutory implication.

[52] In the submission by JKC sent by email at 4:49 pm on 27 January 2017, its solicitors stated:

> In the event that the provisions of the Schedule, Division 5 of the Act were imported into the Contract, the practical effect of those provisions would be as follows:
>
> 5.1 if the Respondent disputes part or all of a payment claim, the Respondent is required to issue a notice of dispute to the Applicant, and pay the undisputed portion of that payment claim, within 14 days of receiving the payment claim. The Applicant then has the right to make an application to adjudicate the payment dispute upon receiving the notice of dispute [Schedule, Division 5, s 2(b)]; or
>
> 5.2 if the Respondent does not dispute the payment claim, it must pay the entire amount claimed under the payment claim within 28 days of receiving the payment claim [Schedule, Division 5, s 2(b)]. If payment is not received within that time, then the Applicant has the right to make an application to adjudicate the payment dispute.

[53] In the submission made by INPEX by email sent at 4:52 pm on 27 January 2017, its solicitors stated:

> 2 INPEX submits that Article 34 of the EPC Contract contains enforceable written provisions about:
>
> (a) when and how INPEX must respond to a payment claim by JKC; and
>
> (b) by when a payment must be made,
>
> and consequently, s 20 of the Act does not (and cannot) operate to imply into the EPC Contract the term contained in the Schedule, Division 5 of the Act (the ***Implied Term***).
>
> **Relevant authorities**
>
> 3 The leading authority in relation to section 20 of the Act is *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd*

[2008] NTSC 46. Two key principles can be taken from that case.

4 First, the purpose of s 20 of the Act is to ensure that construction contracts contain a mechanism dealing with how and when a payment claim must be responded to. Second, s 20 of the Act can only apply if the relevant construction contract:

(a) has no provision about when and how a party must respond to a payment claim; and/or

(b) has no provision about when a payment must be made. (see para [56]).

…

19 For the reasons set out above, INPEX submits that there is no scope for the Implied Term to be imported into the EPC Contract.

20 Further, INPEX submits that it would be inconsistent with the purposes of s 20 of the Act for the adjudicator to find that the Implied Term applies. The parties are sophisticated commercial entities and have negotiated and agreed an extensive provision concerning how and when payment claims are to be responded to. As noted in *Independent Fire Sprinklers*, the intention of s 20 of the Act is that it only apply when no such mechanism exists.

[54] It is clear enough from the Adjudicator's correspondences, and from the submissions in response, that the parties contemplated that the implication would bear upon the time within which objection to a payment claim must be notified; and that the implication of cl 6 would operate to supplant the contractual provision. It is also evident from a plain reading of cl 6 that unless notice of dispute is given within the prescribed time the party receiving the payment claim must pay the whole amount.

[55] It would seem unlikely given the timing of the submissions that the solicitors for INPEX were aware of the content of JKC's submissions at the time the INPEX submissions were finalised. There is no suggestion otherwise in the evidence. However, even if INPEX's advisors did take some comfort from the fact that JKC's submissions echoed their own, that did not mean that they were entitled to sit back and expect that the Adjudicator would inevitably make a finding on the matter of statutory implication as the parties submitted he should. Nor was it incumbent on the Adjudicator to seek further submissions as to the consequences of cl 6 being implied in circumstances where the possibility of that implication had been notified to the parties and those consequences would flow naturally from the implication.

[56] The Adjudicator identified the "critical issue or factor"[22] underlying his preliminary view and upon which the Determination ultimately turned. This was not simply an identification of the general issue joined between the parties in dispute. Although the Determination turned on a point of law not contended for by either of the parties, the issue was squarely identified by the Adjudicator and the parties were given opportunity to address it. That being so, in our opinion the

22 Cf *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205 at [50].

Adjudicator did not fail to provide procedural fairness to INPEX on these grounds.[23]

The Notice of Contention

[57] The single ground in the Notice of Contention is expressed in the following terms:

> 2. Her Honour erred in finding that the obligation imposed on the Adjudicator under s 33(1)(b) of the Act could be discharged in the absence of any consideration by the Adjudicator as to whether the amount claimed "*was 'due' in the sense that the underlying work had been performed and correctly valued under the contract*" [58].
> 3. Her Honour should have found that, in the absence of a bona fide or any consideration as to whether "*any party to the payment dispute is liable to make a payment*" including whether the subject payment claim was a valid payment claim within the meaning of the Act, the Adjudicator had no jurisdiction to make a determination under s 33(1)(b) and any purported determination was necessarily void.

[58] INPEX does not here suggest that the Adjudicator had no jurisdiction to determine the payment dispute, or that the error in implying cl 6 into the EPC Contract was jurisdictional in nature and therefore reviewable, or that there was otherwise any jurisdictional error in the interpretation of the EPC Contract or the Act. Rather, the contention is that the Adjudicator did not make a bona fide attempt to comply with the essential requirements of the Act.

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23 *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151 at [137], [144].

[59] INPEX's argument in this respect proceeds on the assumption that cl 6 was properly implied into the EPC Contract. It is said that in order for cl 6(2) to be engaged there must be a "payment claim" within the meaning of cl 6(1)(a), which denotes "a claim for payment of an amount in relation to the performance by [JKC] of its obligations under the contract".[24] This is said to give rise to an obligation on the part of an adjudicator to make findings in relation to the "obligations" performed under the contract and the components of the claim referable to that performance.

[60] INPEX seeks to draw a distinction in that respect between an adjudicator's task in determining whether a payment claim has been made for the purpose of assuming jurisdiction, and the task under s 33(1)(b) of the Act of determining on the balance of probabilities whether a respondent to a payment dispute is liable to make a payment (and in what amount) in circumstances where that respondent has failed to give a notice of dispute within the time prescribed under cl 6(2)(a)(i) of the implied term.

[61] In that distinction, the first task is said not to require any assessment on the merits, while the second task is said to require a consideration of such matters as possible calculation errors, whether the work

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24 See para (a) of the definition of "payment claim" in s 4 of the Act.

claimed falls outside the scope of the contract, and whether the claim has been valued in accordance with the terms of the contract.

The decision at first instance

[62] The ground presently expressed in the Notice of Contention formed the third ground in the application for review at first instance. The court below dealt with that contention in the following terms:

> The third ground relied upon by INPEX for asserting that the Determination was a nullity was that [the Adjudicator] failed to undertake the statutory task in s 33(1)(b) which required him to consider whether it had been demonstrated that a particular amount was due. I do not agree that an adjudicator must always look into the underlying "merits" of whether or not an amount claimed in a payment claim was "due" in the sense that the underlying work had been performed and correctly valued under the contract. As has been said many times in cases connected with this Act, the focus of the Act is on the contract. If the contract between the parties provides for a claim to be paid in full if not disputed within a given time, then there is no reason why an adjudicator ought not give effect to that provision in making a determination on the merits under s 33(1)(b), and every reason why he should.[25]

The Adjudicator's determination

[63] The relevant parts of the Determination provide:

> 68. As noted, on 24 November 2016 Inpex issued the Notice of Dispute, 21 days after the Payment Claim was lodged. I have no evidence Inpex issued a notice of dispute, compliant or otherwise, within 14 days after receiving the Payment Claim as required by clause 6(2)(a) of the Schedule. In the absence of any compliant notice of dispute and pursuant to clause 6(2)(b) of the Schedule, which was necessarily implied into the Contract, Inpex was obligated to pay the Payment Claim

25 *INPEX Operations Australia Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor* [2017] NTSC 45 at [58].

in full when payment fell due on 1 December 2016, that is 28 days from 3 November 2016. It failed to do so. As noted below, the obligation remains.

…

73. The Credit Note was predicated on Article 34.2 of the Contract which, as I have found, was never in effect. Consequently, I find the Credit Note has no contractual force and that Inpex's obligation to pay the Payment Claim in full remains. This notwithstanding, as noted, JKC seeks payment of USD $83,933,837.00 of the total amount in dispute. I cannot make a determination for an amount in excess of the amount claimed in the application.

Conclusion

74. For these reasons, I will make a determination that Inpex is liable to pay to JKC USD $83,933,837.00.

[64] That determination involved the finding that cl 6 was implied into the EPC Contract; the finding that there had been no notice of dispute given within the time prescribed under that clause; the finding that INPEX was obliged to pay the claim within 28 days after it was made; and a consequent finding that the part of the disputed amount claimed by JKC was payable. It is common ground that this determination did not involve undertaking the tasks which counsel for INPEX asserts were required in the circumstances.

The relevant legal principles

[65] Section 33(1)(b) of the Act confers both an authority and an obligation in the following terms:

(1) An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a):

(b) otherwise – determine on the balance of probabilities whether any party to the payment dispute is liable to

make a payment or to return any security and, if so, determine:

(i) the amount to be paid, or security to be returned, and any interest payable on it under section 35; and

(ii) the date on or before which the amount must be paid or the security must be returned.

[66] A determination in the exercise of that authority will only give rise to jurisdictional defect, and so be reviewable on the ground asserted in the Notice of Contention, if the Adjudicator did not make a genuine attempt to exercise that authority in accordance with requirements of the Act and by reference to the power conferred.[26]

[67] The relevant question is whether in making the Determination the Adjudicator exceeded the authority conferred by s 33(1)(b) of the Act, with the consequence that what purported to be a determination within the scope of that authority was no more than an "ostensible determination".[27]

The conclusion on the Notice of Contention

[68] A number of matters presented to the Adjudicator in exercising the authority conferred by s 33(1)(b) of the Act in discharge of the obligation it imposed. First, there was a valid payment claim. Second, there was a valid payment dispute, whether sourced in a disputation of

26 Citing *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 42; [2004] NSWCA 394 at [55].

27 See the question as formulated by Gageler J in *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5 at [35].

the claim or the failure to pay the amount claimed when due.[28] Third, in the application of cl 6(2) to the finding that no notice of dispute had been given within the prescribed time, INPEX was liable to pay the amount of the claim.

[69] In the circumstances which presented, undertaking those steps was all that was required in making the determination on the balance of probabilities that INPEX was liable to make a payment of that part of the disputed amount claimed by JKC. As the court below effectively determined, where the contract between the parties (as found) provides for a claim to be paid in full if not disputed within a specified time, then in giving effect to that provision an adjudicator is making a determination as required by the merits of the case.

[70] A number of matters are significant in that conclusion. First, the implication of cl 6(2) into the EPC Contract with that consequence did not give rise to jurisdictional defect, and nor does INPEX contend that it did. Second, the authority conferred by s 33(1)(b) of the Act was not in the circumstances conditioned by a requirement that the Adjudicator examine whether the works had been carried out (and particularly not in circumstances where INPEX did not suggest in its response to the Adjudicator that they had not). Finally, the clear legislative intention is that in the absence of a valid notice of dispute payment must be

28 See para (a) of the definition of "payment dispute" in s 8 of the Act.

made on an "interim" basis without prejudice to the parties' substantive rights. In that respect, the Determination has no effect on INPEX's right to prosecute in civil proceedings any contentions it may have in relation to calculation errors, the scope of the contract, and whether the claim has been valued in accordance with the terms of the contract.

[71] For the reasons given by counsel for JKC, the observations made in *Pacific General Securities Ltd & Anor v Soliman and Sons & Ors*[29] do not lead to any different conclusion. The relevant comment in that case was directed to whether the absence of a valid response to an adjudication application obliged an adjudicator to allow the payment claim in full. In those circumstances, it was held that before allowing a payment claim an adjudicator must determine that the works identified in the payment claim were undertaken, and their value.

[72] Those observations were made in the context of the New South Wales legislation, which contains no requirement that a respondent is liable to pay the amount of the claim in the absence of a response. The position obtaining in the application of cl 6 under the Act is quite different.

29 (2006) 196 FLR 388 at [82].

Disposition

[73] The following orders are made:-

(a) The appeal is allowed.

(b) The contention made by notice dated 27 July 2017 is dismissed.

(c) The orders made on 15 June 2017 and the judgment given on 26 July 2017 are set aside.

[74] We will hear the parties in relation to costs.

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